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December 21, 1995

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JAN 11 1996

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Reply of the City of New York and NATOA to
Oppositions to the Petition for
Reconsideration and Clarification of the
Thirteenth Order on Reconsideration in
MM Docket No. 92-266

Dear Mr. Caton:

Please find enclosed the original and eleven (11)
copies of the Reply of the City of New York and NATOA to
Oppositions to the Petition for Reconsideration and
Clarification of the Thirteenth Order on Reconsideration
in the above-referenced proceeding.

Please contact me if you have any questions
regarding this matter.

Sincerely,


William E. Cook, Jr.

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JAN 11 1995

In the Matter of)

Implementation of Sections of)
the Cable Television Consumer)
Protection and Competition)
Act of 1992)

Rate Regulation)

MM Docket No. 92-266

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**REPLY BY THE CITY OF NEW YORK AND
THE NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS
TO OPPOSITIONS TO PETITION FOR
RECONSIDERATION AND CLARIFICATION**

Pursuant to 47 C.F.R. § 1.429(g), the City of New York and the National Association of Telecommunications Officers and Advisors (collectively, the "Local Governments") hereby reply to the Oppositions to the Local Governments' Petition for Reconsideration and Clarification of the Thirteenth Order on Reconsideration¹ in the above-captioned proceeding ("Petition").

It is significant that there are only two filings opposing the Petition.² The Local Governments believe the fact that more

¹ In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Thirteenth Order on Reconsideration (MM Docket No. 92-266), FCC 95-397 (released September 22, 1995) ("Order").

² See Opposition of the National Cable Television Association, Inc. to Petitions for Reconsideration in MM Docket No. 92-266 (filed Dec. 11, 1995) ("NCTA"); Opposition of Cox Communications, Inc., InterMedia Partners, L.P. and Jones Intercable, Inc. to

[Footnote continued on next page]

cable operators did not file comments -- especially when compared to the number of operators filing comments on other issues over the years in this proceeding -- suggests that most cable operators do not oppose the common sense and practical requests for reconsideration and clarification in the Petition. Moreover, NCTA and Cox do not raise convincing arguments as to why the Commission should deny the Local Governments' requests for reconsideration and clarification. For the reasons below, the Commission should grant the requests, particularly given that no party has put forth convincing reasons as to why the requests should not be granted.

DISCUSSION

A. The Commission Should Require Cable Operators to File the FCC Form 1240 Yearly

The Local Governments requested that the Commission:

- (1) require cable operators to file the FCC Form 1240 annually to prevent, among other things, "rate shock"; and
- (2) prohibit an operator from switching from the annual review period back to a quarterly review period.

NCTA and Cox do not present convincing arguments in opposition to these requests. For example, on the one hand, each suggests that subscribers will not experience "rate shock." On the other hand, Cox appears to concede that "rate shock" would be possible. Cox, for instance, suggests that

[Footnote continued from previous page]
Petitions for Reconsideration in MM Dkt. No. 92-266 (Dec. 11, 1995) ("Cox").

"an operator can avoid rate shock by spreading out over a period of time what it believes would otherwise be too high a rate increase." Cox at 4. However, there is no requirement under the FCC rules for operators to spread out such rate increases, and the Commission should not simply trust that cable operators will spread out such rate increases in the absence of a rule. Therefore, to ensure that rate increases do not result in "rate shock," the Commission should require a cable operator to file the FCC Form 1240 annually.

B. The Commission Should Eliminate the Requirement that a Franchising Authority Respond within 15 Days to an Operator's Inquiry Regarding a Rate Proceeding

The Local Governments requested that the Commission eliminate the rule that requires a franchising authority to notify an operator within 15 days of the operator's "inquiry" as to whether the franchising authority intends to issue a rate order. Cox and NCTA do not present convincing arguments in opposition to the request. For instance, the FCC's rule and the Local Governments' proposed revision only address the issue of whether a franchising authority will issue a rate order, and not whether an operator's proposed rate is reasonable. Rather than addressing the issue at hand -- notice to operators as to whether the franchising authority will issue a rate order -- NCTA uses the opportunity to address a different issue -- whether a rate is reasonable. NCTA makes the ludicrous suggestion that "a cable operator's

rates would be presumed reasonable, and not subject to refund or prospective rate reduction, if a franchising authority has not affirmatively taken action to preserve its right to order refunds." NCTA at 9. The Commission should reject NCTA's attempt to turn a simple notice issue into an opportunity for operators to obtain a presumption in favor of the reasonableness of their rates. Moreover, such a presumption would be inconsistent with 47 C.F.R. § 76.937, which puts the burden on cable operators to prove the reasonableness of their rates.

C. Cable Operators Should Refund Overcharges to Subscribers, Rather than Offsetting Such Overcharges Against Future Rate Increases

The Local Governments recommended that the Commission amend its rules to require that cable operators refund to subscribers any overcharges accrued during an annual adjustment period. In addition, to ensure that cable subscribers receive all refunds to which they are entitled, the Local Governments recommended that the Commission eliminate the rule prohibiting franchising authorities from ordering refunds for longer than a one-year period.

NCTA and Cox do not present convincing arguments in opposition to the Petition, which may partly be a result of their failure to comprehend the Local Governments' proposal. For instance, with regard to eliminating the one-year limit on refund liability, Cox suggests that the Local Governments' "argument . . . confuses refunds that result from rate

increases that exceed the Commission's price cap rules with the prospective rate *reductions* and *offsets* that result from the Commission's 'true-up' requirements." Cox at 11-12 (emphasis in original). Cox fails to understand that the Local Governments are proposing that, in addition to price cap overcharges, any overcharges during a past FCC Form 1240 adjustment year be actually refunded to subscribers, rather than offset against rate increases during a subsequent FCC Form 1240 adjustment period.³

D. The Commission Should Eliminate the One-Year Limit On A Franchising Authority's Right to Review a Rate Filing and Issue an Order

The Local Governments recommended that the Commission eliminate the 12-month limit on a franchising authority's right to issue a rate order. NCTA and Cox oppose the request based, in part, on their suggestion that pending rate appeals do not justify a longer period. See, e.g., NCTA at 11-12. However, as the Local Governments stated in the Petition, many franchising authorities are still waiting for the Commission to rule on cable operators' appeals of previous local rate decisions. If the franchising authority is forced to issue a rate decision before such appeal is decided, the franchising authority and Commission will be forced to expend

³ For the reasons explained in the Petition, in such situations, the one-year refund liability period rule will not work since franchising authorities will have no basis for determining whether there was an overcharge during a previous FCC Form 1240 year until the operator provides its next FCC Form 1240. See Petition at 10-13.

scarce resources defending against an additional appeal by the operator on possibly the same issues raised in the previous appeal.

E. The 90-Day Review Period to Review the FCC Form 1240 Should Not Commence Until a Cable Operator Submits a Completed Form that Includes Relevant Attachments

The Local Governments requested that the Commission make clear that the FCC Form 1240 is facially incomplete if it does not include supporting calculations or other documentation in support of the entries on the form. NCTA and Cox oppose such a simple, common sense request. See, e.g., Cox at 13. The Local Governments find it difficult to understand why cable operators would oppose such a simple requirement given that they must attach such information on other FCC rate forms and given that there is no credible reason for cable operators to wait until a franchising authority requests such information before providing it since, presumably, the operator relied on such information to complete the FCC Form 1240.

F. A Franchising Authority Should Have an Additional 90 Days to Review an Amended Rate Filing Containing Substantial Changes

The Local Governments requested that the Commission amend its rules to permit a franchising authority an additional 90 days to review an amended filing that the franchising authority, in its sole discretion, finds contains substantial changes from the initial filing.

NCTA and Cox opposed this requirement based on, among other reasons, their assertion that 30 additional days is sufficient to review an amended filing. See, e.g., Cox at 14. NCTA and Cox understate the potential impact of such adjustments. Franchising authorities have received in the past amended forms that literally adjusted most entries on the form and the assumptions underlying such entries. In such instances, the franchising authority would need an additional 90-day period to review the form since all previous review of the form would become virtually useless.

G. A Franchising Authority Should Pay Interest at the IRS Rate on Franchise Fee Refunds

The Local Governments requested that the Commission amend its rule entitling cable operators interest at 11.25 percent on franchise fee refunds owed by the franchising authority in order to prevent cable operators from profiting on the difference between the rate of interest they pay on subscriber refunds (the IRS interest rate) and the rate of interest franchising authorities must pay. Although opposing the request, NCTA appears to concede that such profiting by operators is possible:

If the LFA were to pay interest for the same period as operators must pay interest they might have a point. But instead, LFAs pay interest over a much shorter time period than operators.

NCTA at 15. NCTA's argument only suggests that the profit might be less than otherwise suggested by the Local Governments, rather

than that an operator would not profit. Hence, if a cable operator must provide franchise fee refunds for a six month period at 9% interest and the franchising authority must pay 11.25% interest on franchise fee repayments to an operator for a two month period, the operator still obtains a profit for the two months the franchising authority must pay a higher rate of interest on the same refund amount.

H. An Operator Should Submit Its Proposed Annual Filing Date 45 Days in Advance of Such Date, and a Franchising Authority Should Have the Right to Reject Such Date

The Local Governments requested that the Commission's rules require a cable operator to provide 45-day advance notice of its FCC Form 1240 filing date and grant a franchising authority the unilateral right to reject the filing date, without any "good cause" limitation. NCTA and Cox oppose the Local Governments' request, and suggest that the Commission's current rules provide a franchising authority sufficient flexibility to select an alternative filing date. See, e.g., Cox at 15-16.

NCTA and Cox are wrong for the following reasons. By requiring a cable operator to provide 45-day advance notice of the filing date, the franchising authority and cable operator possibly can agree in advance on the filing date, thus providing certainty to the rate process. Whereas, under the Commission's current rule, the cable operator could file the FCC Form 1240 without prior agreement that such date is acceptable, particularly in instances where the operator provides only one-day advance notice

of such filing date. The result would create needless tension between the franchising authority and cable operator given that, while they are attempting to resolve the filing date issue, the 90-day review period would have commenced for the franchising authority to review the rate filing. In such a situation, the operator would have no incentive to reach an agreement with the franchising authority on another filing date, particularly if the franchising authority can reject the original filing date only for "good cause." To avoid such problems, the Commission should adopt the proposals in the Petition.

I. The Commission Should Clarify a Franchising Authority's Right to Issue a Rate Order After the Initial 60-Day Review Period for New Equipment Filings

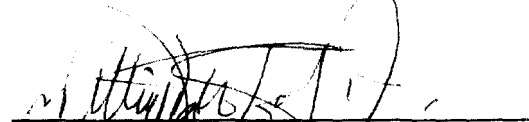
The Local Governments urged the Commission to delete §76.933(h)(1), which requires a franchising authority to issue an accounting order at the end of the 60-day review period for new equipment if the cable operator's "most recent rate filing was based on the system that enables them to file up to once per quarter," and to simply require the franchising authority to apply the same rule that would apply to annual rate adjustments. Cox and NCTA simply assert that it will not be difficult for a franchising authority to determine which time period applies to the review of the FCC Form 1205 for new equipment. However, they do not address the illogic of the Commission applying two different review periods for the same form. The Local Governments believe that the rate regulation review process is already extremely complex and burdensome and do not believe that the

Commission should needlessly add to such complexity by establishing more than one review period for a particular form.

CONCLUSION

The Commission should grant the relief requested in the Petition given that NCTA and Cox do not present convincing arguments as to why the Commission should deny the Petition.

Respectfully Submitted,



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December 21, 1995

CERTIFICATE OF SERVICE

I, William Cook, an attorney at the law firm of Arnold & Porter, hereby certify that a copy of the foregoing Reply was served on December 21, 1995 by first class mail to:

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